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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1990

Arthur C. Ewing, a/k/a A. Clifford Ewing,
and Maxine H. Ewing,
Petitioners

v.

United States of America,
Respondent,

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

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QUESTION PRESENTED

WHETHER THE DECISION BELOW IS IN DIRECT CONFLICT WITH THIS COURT'S PRIOR HOLDING AND THOSE OF OTHER CIRCUITS THAT REMITTANCES MADE TO THE IRS PRIOR TO ASSESSMENT ARE TO BE TREATED AS "DEPOSITS" AGAINST AMOUNTS TO BE LAWFULLY ASSESSED, NOT AS "PAYMENTS" WHICH THE IRS MAY RETAIN IF IT FAILS TO MAKE A LAWFUL ASSESSMENT.

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OPINION BELOW

The opinion of the Court of Appeals, Arthur C. Ewing a/k/a A. Clifford Ewing and Maxine H. Ewing v. United States of America is reported at 914 F.2d 499 (4th Cir. 1990). (App. A). The opinion of the United States District Court for the Western District of North Carolina is

reported at 711 F.Supp. 265 (W.D.N.C. 1989). (App. B). The decision of the Court of Appeals denying rehearing is reprinted in Appendix C.

JURISDICTION

The decision below was issued on September 17, 1990. A Petition for Rehearing and Petition for Rehearing En Banc was filed on October 5, 1990, a motion for extension having been granted. The petition for rehearing was denied on December 10, 1990. A petition for Writ of Certiorari was filed within ninety days of the denial of the petition for rehearing. Jurisdiction of this Court is claimed under 28 U.S.C. §1254(1) and Rule 10.1(a).

STATUTES AND RULES

Internal Revenue Code § 6201 -- Assessment Authority. (a) Authority of Secretary -- The Secretary is authorized and required to make the inquiries, determinations and assessments of all taxes, including, interest, additional

amounts, additions to the tax, and assessable penalties (imposed by this Title, or accruing under any former Internal Revenue law) which have not been duly paid by stamp or at the time and in the manner provided by law.

Internal Revenue Code § 6203 -- Method of Assessment. The Assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules and regulations prescribed by the Secretary. Upon request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of assessment.

Treasury Regulation § 301.6203-1 -- Method of Assessment. The district director and the director of the regional service center shall appoint one or more assessment officers. The district director shall also appoint assessment officers in a Service Center servicing his district. The assessment shall be made by an assessment officer signing the summary record of assessment. The summary record, through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment. The amount of the assessment shall, in the case of tax shown on a return by the taxpayer, be the amount so shown, and in all other cases the amount of the assessment shall be the amount shown on the supporting list or record. The date of the assessment is the date the summary record is signed by an assessment officer. If the taxpayer requests a copy of the record of

assessment, he shall be furnished a copy of the pertinent parts of the assessment which set forth the name of the taxpayer, the date of assessment, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment.

Internal Revenue Code § 6401 -- Amounts treated as Overpayments. (a) Assessment and collection after overpayment. The term "overpayment" includes that part of the amount of a payment of any Internal Revenue tax which is assessed or collected after the expiration of the period of limitation properly applicable thereto.

STATEMENT OF THE CASE

On April 23, 1986 the Ewings requested a return of cash remittances which they had transferred to the IRS in 1984 relative to tax deficiencies in prior years which the IRS had not timely assessed. Plaintiffs' request was timely. On June 5, 1986 the IRS denied the Ewings' request on the basis of Revenue Ruling 85-67. Thereafter, the Ewings brought this lawsuit to recover the amount of the monies remitted in 1984

to the IRS for taxes which were not timely and lawfully assessed and for the overpayments made in 1985 plus interest.

Both sides filed Motions for Summary Judgment. The Honorable Richard L. Voorhees denied the Government's Motion, granted the Ewings' Motion and entered a Memorandum and Order in accordance therewith. The Government appealed Judge Voorhees' Order to the Fourth Circuit Court of Appeals. On September 17, 1990, the Fourth Circuit Court of Appeals reversed and remanded. On December 10, 1990, that Court denied rehearing.

STATEMENT OF FACTS

The Internal Revenue Service ("IRS" or "Government") failed to assess Arthur C. Ewing, a/k/a A. Clifford Ewing and Maxine H. Ewing ("Taxpayers") for potential tax liabilities within the statutory period of limitations.

Internal Revenue Code §6501 mandates that the IRS make assessments for tax liabilities within the statutory period of limitations. The Honorable Richard L. Voorhees, United States District Court for the Western District of North Carolina, held that the IRS had failed to assess any taxes and, following the rationale of Rosenman v. United States, 323 U.S. 658 (1945), entered judgment for the Ewings in the amount of $333,641.17 in a decision reported at 711 F.Supp. 265. The Court of Appeals for the Fourth Circuit reversed, and Taxpayers now petition for certiorari.

Taxpayers timely filed joint Federal income tax returns for the years 1976, 1977, 1978 and 1979, and paid with the returns the taxes reflected thereunder. The IRS audited these returns and proposed adjustments which would have

resulted in income tax deficiencies. Taxpayers voluntarily executed a series of Consents to Extend the Time to Assess Tax (Form 872). Pursuant to these consents, the IRS was required to assess all taxes owed by December 31, 1984.

On July 31, 1984, Taxpayers signed IRS Forms 1902-B Report of Individual Income Tax Examination Changes for years 1976 and 1979, and also executed IRS Form 4549 Income Tax Examination Changes for years 1977 and 1978. By signing, Taxpayers gave the IRS the immediate right to "assess and collect" income tax deficiencies reflected on the forms and waived their right to appeal the amount of the proposed deficiencies. Taxpayers also executed Forms 906 Closing Agreements agreeing that the IRS would make a final determination regarding certain specified matters.

On August 14, 1984, the Ewings delivered personal checks to the IRS for the amounts of the asserted deficiencies inclusive of interest for the years in question as shown on the Forms 1902-B and the Form 4549. Taxpayers did so to stop interest from running on any amounts properly owed. Taxpayers fully expected the IRS to make a lawful assessment of the tax and interest owed. The IRS treated the monies which it received as "advance payments" (deposits) and treated the monies for interest as "designated payments of interest" as evidenced by the IRS Transaction Computer Codes and print-out sheets.

The IRS failed to assess the increased tax liability for the years in question (1976 to 1979, inclusive) before the expiration of the statute of limitations on December 31, 1984.

Upon learning of its failure to timely assess, the IRS embarked on a mission of disinformation to cover up its own incompetence at the expense of the Ewings. An internal investigation by the IRS disclosed that the Memphis Service Center was aware of the Taxpayers' case, along with hundreds of other potential statute cases, in October 1984. These cases were mismanaged and James Crocker, Chief of the Examination Branch in which these failures existed, was demoted. Aware of the mismanagment of these and other cases, the IRS then issued Revenue Ruling 85-67 as a means to justify and validate its wrongful decision to retain monies remitted to it pending assessment. Approximately one year later, on November 15, 1985, the IRS notified Taxpayers that the required assessment had not been made. On

February 5, 1986, after great effort on the part of Taxpayers to find out the status of the case, the IRS disclosed that for the years in question, the IRS had assessed only the amounts which were reported on the Taxpayers timely filed Federal income tax returns. The IRS conceded that it could make no additional assessment as the statute of limitations had expired on December 31, 1984.

On April 23, 1986, the Ewings timely requested a return of the monies remitted to the IRS in 1984 on the grounds that the IRS had not timely assessed a deficiency. On June 5, 1986, the IRS denied the request. This suit followed.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS IN DIRECT CONFLICT TO THIS COURT'S PRIOR HOLDING AND THOSE OF OTHER CIRCUITS THAT REMITTANCES MADE TO THE IRS PRIOR TO ASSESSMENT ARE TO BE TREATED AS "DEPOSITS" AGAINST AMOUNTS TO BE PROPERLY ASSESSED, NOT AS "PAYMENTS" WHICH THE IRS MAY RETAIN IF IT FAILS TO MAKE ASSESSMENT.

Congress established laws for levying taxes and for the administration of the tax laws. As a duty of American democracy, citizens accept a voluntary, self-assessment system of taxation because they believe the tax system is administered fairly. Congress placed duties on the IRS to fairly and uniformly administer the tax laws in a manner to provide certainty, predictability and stability. In tax administration, the theory of deus ex machina is advanced so as to avoid evaluating individual situations of hardship. Thus, we find the familiar rule that there is "no equity in taxation".

To protect the system, Congress provided detailed, administrative laws that can be used to evaluate performance of the tax system. A citizen voluntarily

files a tax return and through withholdings or estimates tenders monies to IRS. IRS "assesses" the tax shown on the return; applies the monies to the "tax debt" by "collection" through a "payment" of the tax debt. Upon subsequent examination, the IRS may make adjustments creating a "deficiency", but no tax debt is created until there is a lawful assessment.

Here, no lawful assessment occurred; the statute of limitations intervened, so no tax debt was created. Thus, no tax could be "collected" by a "payment of taxes".

The parties agreed to the computation of a deficiency. The Ewings delivered money to IRS in 1984 to toll the accrual of interest. IRS accepted the monies and logged the money in on its

books as advance payments. The IRS never assessed the tax.

Here the conduct of IRS is: "Oops, we made a mistake! By law we cannot keep the money on deposit; so to cover our conduct and keep the money we need only publish a ruling stating, la possession vaut titre". Thus, the IRS resorts to the first law of a bully or tyrant. Below the IRS urged the Court to review the case in its simplest form, did the Ewings intend to make a "payment" in the ordinary sense of the term. To accept that argument releases the IRS from its statutory duty. This Court must protect citizens and the voluntary compliance tax system itself from the wrongful acts of IRS. The integrity of the tax system is more important than the Ewings' money. Confidence in tax administration is the key issue in this case. The act of

assessment is required by statute. The act of signing the assessment certificate signals the date for computing interest or filing a claim for refund.

The District Court found that there had been no lawful "assessment" and, therefore, no "payment". The IRC does not define "payment". Hence, we must look to case law. In the landmark case addressing the question of what constitutes a "payment", this Court held that remittances made prior to assessment are "deposits" and not "payments" of taxes duly collected. Rosenman v. United States, 65 S.Ct. 536, 323 U.S. 658 (1945). Therefore, because there has not been and cannot be any lawful assessment of additional taxes for the years 1976, 1977, 1978 and 1979, remittances which Petitioners made to stop the running of interest do not constitute "payments".

The Government conceded that if Petitioners' remittances were not "payments", "there is no question that the monies in question must be returned." Brief of Appellant, p. 11. When the IRS records were finally produced, they revealed that the remittances were logged as "advance payments" and treated as deposits.

The question before this Court in Rosenman was whether a claim for refund of Federal estate taxes was barred by the applicable statute of limitations. The answer hinged on when a "payment" was deemed to have been made. The Government contended that "payment" occurred when the estate transmitted monies to the IRS. The estate contended that "payment" occurred when the IRS assessed the deficiency. This Court agreed with the estate and held that the tax obligation

did not become defined until the Government assessed the deficiency. In so holding, the Court looked to the treatment which the Government accorded the estate's remittances.[1] The Court found:

> It was merely an interim arrangement to cover whatever contingencies the future might define....The receipt by the Government of monies under such an arrangement carries no more significance than would the giving of a surety bond. Money in these accounts is held not as taxes duly collected are held but as a deposit made in the nature of a cash bond for the payment thereafter found to be due ...

---

1 *The court below asserts that the Supreme Court's holding in Rosenman was based upon its finding that the estate had remitted the money under protest. While the Court's statement of the facts discloses that the estate did accompany its remittances with a letter stating that it was doing so under protest, the Supreme Court did not rely on that fact or discuss it in its findings and holding.*

323 U.S. at 662. In addition, the Court observed:

> ... by allowing such a deposit arrangement, the Government safeguards collection of the assessment of whatever amount tax officials may eventually find owing from a taxpayer, while the taxpayer in turn is saved the danger of penalties on an assessment made, as in this case, years after a fairly estimated return has been filed.

323 U.S. at 663.

In this case, as in Rosenman, the IRS treated the Ewings' remittances as advance payments and set them aside in a special account pending a timely assessment. It was not until after the IRS realized that it had failed to make a timely assessment that it unlawfully attempted to make an assessment and then credited and transferred the monies to the Ewings' account as evidenced by the

IRS' own Computer Transaction Code.[2] That there always must be an assessment of an additional deficiency in taxes before there can be a "payment" on that tax liability is born out by subsequent case law and the IRS' regulations.[3]

The most recent case determining this controversy over whether remittances made prior to assessment are "deposits" or "payments" of a tax found to be due is Becker Bros., Inc. v. United States of America, 1988 W.L. 75234, 61 A.F.T.R.2d 88-1147, 88-U.S.T.C. 9262(C.D. Ill.

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2 *The IRS Computer Transaction Codes for the years in issue show that the IRS attempted to assess the deficiencies and credited them to Ewings' account in the twenty-second week of 1985, well beyond the required statutory period of limitations.*

3 *Revenue Ruling 85-67 is excluded from this characterization. Revenue Ruling 85-67 was issued on May 28, 1985 after the statute of limitations on assessment had run on the Ewings' case.*

1988). In Becker, the Tax Court case was resolved by a negotiated settlement. The plaintiff made advance payments on its anticipated tax liability and thereafter, the Tax Court entered an "agreed" decision. The IRS subsequently assessed the agreed deficiencies. Thereafter, the plaintiff filed claims for refund alleging that it was entitled to a return of all amounts paid under the negotiated settlement because the taxes were not timely assessed. The IRS denied the refund claims and the plaintiff filed suit in federal district court. The district court found that the IRS had timely assessed the taxes for all but one of the years in issue. As to the one year for which no timely assessment was made, the district court stated:

> The Plaintiffs are claiming that for those periods which were not timely assessed, they should be entitled to a refund of the voluntary

payments made prior to the assessment deadline. The Defendant claims that it is entitled to keep the payments, although, it admits that the Plaintiffs are entitled to a refund of any payments made after the assessment deadline for those periods where the United States had not timely assessed the tax.

* * *

...the holding in the case of Goetz v. United States, 286 F.Supp. 128 (W.D. Mo. 1968), is the correct holding on this issue. In Goetz, the court found that there is no "payment" prior to the expiration of the statute of limitations on assessments. The term "payment" under the Code means the application of funds to a liability. Without the assessment having first occurred, there can be no such application of funds....

* * *

It is this Court's opinion, as the court in Goetz found, any payment prior to the assessment process, is not a "payment," but a "deposit" on potential tax liability. Thus, such "deposit" is not retainable by the IRS as payment on tax liability, where

> the tax is not timely assessed. (Emphasis added.)

1988 W.L. 75235-36.

Here, as in Becker, the Ewings do not contend that they have "overpaid" their taxes and are entitled to a "refund". Rather, they contend that because the Government failed to carry out its duty to timely assess any additional tax deficiencies resulting from audit examination changes for the years in issue, they are entitled to a return of the monies they deposited with the IRS to stop the running of interest on those deficiencies. Becker is squarely on point. The Government has a duty to assess and absent a timely assessment, a taxpayer is entitled a return of any remittances he makes. This is true regardless of whether the taxpayer has agreed to a proposed deficiency or even entered into a

stipulated settlement which is the subject of a court order. The language of Congress is clear and unequivocal: "The Secretary is authorized and required to make inquiries, determinations and assessments of all taxes ..." Section 6201(a).

The Fifth Circuit, in one of the earliest cases to apply Rosenman, adopted what may be termed a "per se" rule of assessment. Thomas v. Mercantile National Bank of Dallas, 204 F.2d 943 (5th Cir. 1953). In Thomas, the IRS notified the taxpayer of a proposed deficiency and the taxpayer responded with a check for the exact amount. The IRS credited the monies directly to the account of the taxpayer. However, the formal deficiency assessment was not entered until sometime after the Government received the money.

Subsequently, the estate filed a claim for refund. The Commissioner rejected the claim on the ground that it was not filed within three years of the date that the Government received the money. The district court, however, held the claim timely and entered judgment for the taxpayer. On appeal, the Fifth Circuit stated:

> Until the Commissioner certified the assessment list on August 17, 1945, there was no deficiency assessment, and no liability on the part of the taxpayer, and consequently nothing to pay. The sum deposited with the Collector on August 2, 1945, was merely an advance deposit to cover additional tax liability expected to arise thereafter. Neither the estate's liability, nor the fact that there was an overpayment could be determined until the deficiency assessment was entered. It would be illogical to hold, as the United States contends, that the statute of limitations began to run against the claim for refund before the deficiency itself came into existence, and before the fact

> that there was an overpayment, and if so, the amount thereof, became ascertainable. (Cites omitted.) (Emphasis added.)

204 F.2d at 944.

The Thomas court did not rely on how the Government treated the taxpayer's remittances, i.e. placing them in an suspense account or applying them directly to the proposed deficiency. Thomas looked only to the strict rule that the Government must assess the taxes before it can lawfully credit them to the account of the taxpayer. That is precisely what Petitioners ask this Court to do.

The Fifth Circuit followed its earlier holding in Thomas in Ford v. United States, 618 F.2d 357 (1980), a case similar to Thomas. In response to a statutory notice of deficiency that they had underpaid income taxes for 1970 and 1971, the Fords remitted to the IRS

approximately $8,000 on June 6, 1974. Not until August 19, 1974, however, did the IRS assess the deficiency. On August 9, 1976 the Fords filed claims for refund of the monies sent to the IRS.[4] The IRS disallowed the claims as untimely, contending they were not made within two years of "payment". The question on appeal was whether the Fords filed their refund claims within two years after they "paid" the additional tax. Following the precedent established in Thomas, the three-judge panel held that the taxpayers' claim for refund was timely and stated "until formal certification of the tax assessment list, no tax could have been paid because until

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4 *It should be noted that the Fords could have requested a return of the monies they remitted to the IRS at any time prior to a lawful assessment.*

then there was no tax liability". (Emphasis added.) 618 F.2d at 359. Despite the panel's suggestion that the Fifth Circuit meet in banc to reverse Thomas, and presumably adopt a novel theory, the Fifth Circuit refused that suggestion. Thus, the "per se" assessment rule prevails in the Fifth Circuit.

The Eighth Circuit follows the Fifth Circuit on this issue of whether a remittance constitutes a "payment" or a "deposit". United States v. Dubuque Packing Co., 233 F.2d 453 (8th Cir. 1956) In Dubuque the taxpayer had agreed to proposed deficiencies, signed a waiver of restrictions on assessment and collection and remitted monies to the IRS. The court held that the statute of limitations on a claim for refund began to run, not on the date when the taxpayer

"voluntarily" remitted money to the Government, but on the date of assessment. The Court stated:

> It is contended for the Government against this view that the taxpayer's remittances constituted voluntary payment of the deficiencies. It stresses particularly that the taxpayer "agreed" to the deficiencies and that it waived the restrictions on assessment and collection of the deficiencies. But the "agreement" relied on was not an agreement to the obligation of indebtedness in the ordinary sense. The revenue agent proposed deficiencies and the taxpayer by its "agreement" merely indicated its willingness that the taxation process go forward to assessment....

233 F.2d at 460.[5]

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5 *The Government urged that Dubuque is not the law in the Eighth Circuit and cites Essex v. Vinal, 499 F.2d 226 (8th Cir. 1974), cert. denied, 419 U.S. 1107 (1975). Essex does not stand for a taxpayer intent rule of assessment.*

By signing IRS Forms 1902-B and 4549 for the years in question the Ewings waived their right to appeal the amount of the proposed deficiencies administratively or to the United States Tax Court and consented to the immediate assessment and collection of the proposed deficiencies. By signing the Closing Agreements the Ewings agreed to a final determination covering specific matters pertaining to the amount of their income, gains, losses and deductions resulting from certain investments in limited partnerships. The Ewings did not sign a waiver of the Government's obligation to comply with the tax code and the Treasury Regulations which required a timely assessment. Indeed, every document they signed contemplated that the Government would obey the law and was required to assess the additional taxes. This the Government failed to do.

Following Dubuque, a federal district court in the Eighth Circuit dealt with a fact situation almost identical to that which is before this court. In Goetz, supra, the court held that the taxpayer was entitled to a return of monies it remitted to the IRS prior to the statute of limitations on assessment and in response to a notice of deficiency where the Government did not assess until after the statute had run. The court stated:

> It does not follow from the fact that the Service had the taxpayer's money in hand prior to the running of statute of limitations, that the money was duly collected. In order for the tax liability to have been duly collected it must have been properly assessed and such was not the case here in that the assessment was made at a time subsequent to the running of the statute of limitations.
>
> We are persuaded in so holding by the reasoning of the court in Rosenman v. United

> States which recognized that payments prior to assessment are deposits and not payments of taxes duly collected.

286 F.Supp. at 130-31.

This is exactly what the Ewings contend. They do not seek a "refund" of the monies they remitted in 1984 prior to the expiration of the statute of limitations on assessment. Rather, they seek a return of those monies since the monies were not and are not lawfully due and owing.

The Seventh Circuit joins the Fifth and Eighth Circuits in reading Rosenman to mean that remittances of additional taxes made prior to assessment are "deposits". Plankinton v. United States, 267 F.2d 278 (7th Cir. 1959).

The court below correctly observed "... sister circuits have entertained questions necessarily implicating the issue of the necessity of assessment

..."; then it reviewed the cases in the six circuits that ruled on pertinent cases. The court below seemed happy with the opinion in Ameel v. United States, 426 F. 2d 1270 (6th Cir. 1970), but ignored the fact that no case in 21 years has followed Ameel. The Fifth Circuit in Ford (1980) stayed true to Thomas (1953). The trial court ruling in Goetz (1968) clearly followed Dubuque (1956). Most importantly is that IRS did not challenge the trial court's order in Becker (1988) which was subject to rule of the Seventh Circuit. The facts in Becker are so similar to the present case that they cry out to be followed, yet the court below merely opines: "There has been no firm resolution of the question...." The appellate court simply erred by not following the clear trend of jurisprudence. Therefore, this Court

should acknowledge that: "[T]he circuit courts have divided their application of Rosenman" and grant this petition for certiorari.

II. THE DECISION BELOW IGNORES THE EXPRESS LANGUAGE OF THE INTERNAL REVENUE CODE WHICH REQUIRES TIMELY ASSESSMENT OF TAXPAYER LIABILITY.

The underlying question in this case is whether monies remitted to the IRS prior to assessment constitute "payment" of additional taxes or "deposits" within the meaning intended by Congress in the Internal Revenue Code ("IRC"). The District Court correctly found that the subject remittances constituted "deposits" and therefore, granted judgment for Petitioners.[6]

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[6] *The District Court did not distinguish between the remittances which the Ewings made in 1984 prior to the expiration of the statute of limitations on assessment and those made in 1985 after the expiration of the statute. Petitioners agree that the 1984 remittances should be viewed differently from the 1985 remittances in that they are entitled to interest only on the amounts remitted in 1985 which were not applied to other years not in issue (i.e. $42,216.65).*

Congress has accorded particular legal significance to the act of assessment. The Government's duty to assess all taxes permeates the IRC, the regulations promulgated under the IRC, and the Commissioner's own interpretations of the IRC and the regulations.[7] The Government's duty to assess is set out clearly in Section 6201:

> **Section 6201. Assessment authority.**
>
> **(a) Authority of Secretary** - The Secretary is authorized and required to make the inquiries, determinations and assessments of all taxes, including interest, additional amounts, additions to the tax, and assessable penalties

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7 *The applicable Revenue Procedures reinforce the duty of the Government to assess. Revenue Procedure 63-11, 1963-1 C.B. 497, sets the stage for the treatment by the IRS of "advance payments" made prior to assessment. That Procedure provides that "an advance payment which is not assessed will be treated as a deposit in the nature of a cash bond for the payment of taxes thereafter found to be due."*

> (imposed by this Title, or accruing under any former Internal Revenue law) which have not been duly paid by stamp or at the time and in the manner provided by law. (Emphasis added.)

The Code further provides for the manner in which assessment is to be accomplished:

> Section 6203. Method of assessment.
>
> The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules and regulations prescribed by the Secretary. Upon request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of assessment. (Emphasis added.)

And, the Commissioner's regulations further spell out the exact procedure to be followed. Treasury Regulation §301.6203-1 provides:

> Method of Assessment. The district director and the director of the regional service center shall appoint one or more assessment

> officers. The district director shall also appoint assessment officers in a Service Center servicing his district. The assessment shall be made by an assessment officer signing the summary record of assessment....The date of the assessment is the date the summary record is signed by an assessment officer.[8]

Further, the regulations provide for the making of a supplemental assessment to correct any material errors or omissions prior to the expiration of the statute of limitations.[9]

Congress also imposed certain limitations on assessment and the

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8 *Although the Ewings requested a copy of the record of assessment, the IRS did not and could not furnish them one since no assessment of additional taxes was ever made.*

9 *Treasury Regulation § 301.6203-1 provides:*

> ***Supplemental assessment.*** *If any assessment is incomplete or incorrect in any material respect, the district director or the director of the regional service center,...may make a supplemental assessment for the purpose of correcting or completing the original assessment.*

subsequent collection of taxes. The general rule is that "the amount of any tax ... shall be assessed within three years after the return was filed." Section 6501 (emphasis added) However, the IRC provides for this three year period to be extended by the agreement of the Government and the taxpayer. In that event, the Government must assess any additional taxes prior to the expiration of the period agreed upon. Section 6501(c)(4).

The second point is that there is no equity in taxation. Tax laws are technical and are literally interpreted. See e.g. Richardson v. Smith, 301 F.2d 305 (3rd Cir. 1962) (wherein the court observed "taxation is a game which must be played strictly in accordance with the rules"). Every taxpayer who has missed a statutorily required filing date has bitterly learned this lesson. For good

government, the rule must be the same where the IRS has failed to strictly comply with the obligations imposed upon it. See, e.g., Brafman v. United States of America, 384 F.2d 863 (5th Cir. 1967) (where the Government was foreclosed from collecting additional estate taxes because the assessment certificate was not signed by a proper officer of the IRS within the statutory period for assessment).

Finally, it should be understood at the outset that Ewings' claim is for a return of the monies they remitted to the IRS in 1984 prior to the expiration of the statute of limitations on assessment and a refund with interest of the monies remitted in 1985 after the statute of limitations had run. Petitioners' claim to monies remitted before the statute of limitation on assessment expired is not a claim for a refund of an overpayment

pursuant to Section 6402. Section 6401 defines "overpayment" as follows:

> **Section 6401. Amounts treated as Overpayments.**
>
> **(a) Assessment and collection after overpayment** - The term "overpayment" includes that part of the amount of a payment of any Internal Revenue tax which is assessed or collected after the expiration of the period of limitation properly applicable thereto. (Emphasis added)

The monies remitted by the Ewings in 1984 were not assessed or collected after the applicable limitation period. Therefore, they are not "overpayments". However, because the Government did not and cannot make a lawful assessment of those monies, it is holding them illegally and must be compelled to return them to the Ewings. As for the monies remitted after the period of limitations on assessment had run, these remittances are in the nature

of an "overpayment" and must be refunded to the Ewings with interest.[10]

III. THERE CAN BE NO PAYMENT UNTIL AN ASSESSMENT IS PROPERLY MADE.

The Fourth Circuit acknowledges that there is a split of authority on this question of whether a remittance made prior to assessment of additional taxes can constitute a "payment" if not thereafter timely and lawfully assessed. The better authority, based on this Court's decision in Rosenman, establishes the legal precedent that there can be no "payment" until a timely assessment has

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10 *The IRS itself recognized that the remittances made by the Ewings in 1985 were akin to overpayments because at the time they were received the Government could only apply those monies to tax liabilities which were timely assessed and which were still open under the statute of limitations. Any funds not so applied were, therefore, refunded to the Ewings plus interest.*

been made. The authority relied upon by the Court can be grouped into three categories: (1) that which misinterprets Rosenman; (2) that which ignores Rosenman; and (3) that which is wholly inapplicable.

In support of its opinion below that the intent of the taxpayer determines the status of a remittance made prior to assessment, is the Second Circuit in Lewyt Corp. v. Commissioner of Internal Revenue, 215 F.2d 518 (2nd Cir. 1954). At issue was the allowance or disallowance of a deduction for excess profits taxes. The taxpayer argued that the remittances had been "paid" within the meaning of the IRC so as to claim a deduction on his tax return. The Second Circuit found that the taxes had not been "paid" since the amount was still in dispute, relying on Rosenman. Actually,

in Rosenman this Court observed that the taxpayer "did not discharge what he deemed a liability", and accorded no weight to the taxpayer's protest. The holding was based on the principal that the IRS has a duty to assess. Rosenman construed the statutory requirement that the Government shall assess all taxes. Moreover, Lewyt is not directly applicable because the taxpayer was an accrual basis taxpayer and, unlike here, the Government had not defaulted on its duty to make a timely assessment.

In Rose v. United States, 256 F.2d 223 (3rd Cir. 1958), the Third Circuit relied on the expansive interpretation of Rosenman found in Lewyt. The issue in Rose was the allowance or disallowance of a deduction. The court disallowed the deduction because the amount of the liability was unsettled and held that the

collector was not "under any duty to regard the remittance as a payment, and in fact he did not do so here." 256 F.2d at 227.[11] Rose follows Rosenman to the extent that its holding is based upon the way in which the Government treated the taxpayer's remittances. In this case there was no dispute that the IRS treated the Ewings' remittances as advance payments or "deposits" as reflected on the Computer Transaction Codes.

The Court of Claims in Charles Leich and Company v. United States, 329 F.2d 649 (Ct.Cl. 1964) followed Rosenman. The

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11 *Lewyt and Rose can also be counted among the cases the Government cites which have no applicability here. At issue in both Lewyt and Rose was the year for which certain remittances were deductible and that issue was resolved based upon the status of the taxpayer, i.e. whether he was a cash taxpayer or an accrual taxpayer.*

taxpayer sought statutory interest on certain remittances he had made which were subsequently returned to him when the Government failed to assess. At the time he remitted the monies for the year in question, the taxpayer was protesting an asserted deficiency for other years. The IRS failed to assess a deficiency for the year in issue and argued, therefore, that the remittances were not "overpayments" which entitled the taxpayer to interest but were "advance payments" on which no interest accrues. The Court of Claims agreed and held:

> There is no dispute that the Government never made an assessment. Therefore, the taxpayer was never required to pay the tax for there was never an obligation imposed by law to pay any tax.

329 F.2d at 653. It should be noted that the year at issue in Leich was not a year for which he was contesting proposed

deficiencies. Significantly, the question in Leich was whether the taxpayer was entitled to statutory interest on his "deposits". Unlike this case, the Government returned these "deposits" to the taxpayer because it had failed to assess. The Ewings do not contend that they are entitled to statutory interest on the monies they remitted in 1984 prior to the expiration of the statute of limitations on assessment.

Another case cited in the opinion below is Fortugno v. United States, 353 F.2d 429 (3rd Cir. 1965). There, the Third Circuit read into Rosenman the notion that an "acquiescence in the proposed deficiency" could determine the date from which the statute of limitations on a claim for refund might run. No where does Rosenman talk about

an acquiescence by the taxpayer. Further, in Fortugno, unlike here, the Government had carried out its duty to assess.

In its Opinion, the Fourth Circuit relied on Ameel and Hill v. United States, 263 F. 2d 885 (2d Cir. 1959). In Ameel, the Court relied on a treatise rather than statutory or case law in holding that the statute of limitations on a claim for refund of an overpayment of estate taxes ran from the date the executrix made a remittance "with intent to satisfy a proposed deficiency." 426 F.2d at 1273. Ameel is distinguishable in that, unlike here, the Government had made a timely assessment after receipt of the remittances. In Hill, the court held that remittances accompanied by the taxpayer's income tax return constitute "payments" for purposes of determining

when the statute of limitation on refunds commences. Hill does not deal, however, with the question of remittances made subsequent to the filing of a return. The Government's attempt to treat the same transaction as a "payment" and not a "payment", whichever favors it, cannot be allowed.

In the final analysis, whether the remittances are called payments, deposits, transfers, advance payments or anything else, the fact remains that the IRS has a duty to timely assess additional tax deficiencies. § 6501(a) and (c)(4) By its own admission the IRS failed to assess the additional tax deficiencies within the statutory period. Therefore, it could not and did not lawfully credit the monies to the Ewings' account. The Fourth Circuit quoted §6501 dealing with the statute of

limitations and failed to address the provisions of §6201 and the reasoning of Dubuque.

Were this Court to find that the IRS is somehow excused from its duty to timely assess the additional taxes, then it must recognize that it is judging the Government by an entirely different standard than that which the Government judges its taxpayers. If the IRS does not have to play by its own rules, then taxpayers cannot be expected to do so either. Throughout the history of the IRC, a statutory deadline is nonetheless a deadline whether it be applicable to the taxpayer or the IRS. If the IRS suffers no consequences from its failure to make a timely assessment, in accordance with statute, then taxpayers should henceforth suffer no penalties from their failure to timely file their

tax returns, timely pay their taxes or timely file claims for refund.

The Ewings respectfully urge that the same rule govern all. It is this Court's task to determine which rule that will be.

IV. CONCLUSION

The IRC is clear in its mandate that the IRS must assess all taxes and that if it fails to make a lawful assessment within the applicable statutory period, it is barred from assessing and collecting any additional taxes. It is undisputed that the IRS did not assess additional tax deficiencies against the Ewings for taxable years 1976, 1977, 1978 and 1979 within the statutory period for assessment. It is now barred from collecting those taxes and is unlawfully holding the monies the Ewings remitted in anticipation that a lawful assessment

would be made. This Court must not adopt a rule that the intent of the taxpayer determines the nature and legal significance of a remittance. Were this Court to adopt such a position, it would be contrary to the IRC, the Commissioner's regulations and sound judicial precedent. Moreover, it would open the door to increased litigation whereby courts would be called upon to examine the intent of taxpayers in a wide variety of transactions affecting taxable and nontaxable income. Most importantly, however, if this Court denies this Petition of Certiorari and ignores the duty of the IRS to assess, it is in effect creating a different and looser standard for the Government than that which is demanded of the taxpayer.

For the reasons stated above, the Petitioner respectfully requests that certiorari be granted and the case set

down for briefing and oral argument; or in the alternative, that certiorari be summarily granted.

For all the above reasons, the Ewings respectfully pray this Court to enter an Order as follows:

1. Granting the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit; and

2. Such other relief as is natural to the best interests of justice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day served upon the parties named below copies of the foregoing Petition for Writ of Certiorari by depositing copies thereof in the United States mail, postage prepaid, addressed as follows:

Kenneth W. Starr
Solicitor General
Department of Justice
Constitution Avenue
Washington, D.C. 20530

Gary R. Allen
William S. Estabrook
Mary Frances Clark
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

This the 19 day of February, 1991.

J. Randall Groves

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-1756

ARTHUR C. EWING, a/k/a A. CLIFFORD EWING and MAXINE H. EWING,

Plaintiffs-Appellees,

v.

THE UNITED STATES OF AMERICA,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Statesville. Richard L. Voorhees, District Judge. (CA-88-71-ST-C)

Argued: April 5, 1990
Decided: September 17, 1990

3efore HALL and SPROUSE, Circuit Judges, and SMITH, United States District Judge for the Eastern District of Virginia, sitting by designation.

Reversed and remanded by published opinion. Judge Sprouse wrote the opinion, in which Judge Hall and Judge Smith joined.

ARGUED: Mary Frances Clark, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant. J. Randall Groves, WEINSTEIN & STURGES, P.A., Charlotte, North Carolina, for Appellees. ON BRIEF: Shirley D. Peterson, Assistant Attorney General, Gary R. Allen, William S. Estabrook, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Thomas J. Ashcraft, United States Attorney, Charlotte, North Carolina, for Appellant. Steve C. Horowitz, Joyce W. Wheeler, WEINSTEIN & STURGES, P.A., Charlotte, North Carolina, for Appellees.

SPROUSE, Circuit Judge:

The underlying action was initiated in the district court by Arthur C. Ewing and Maxine H. Ewing (taxpayers) for return of sums they had remitted to the Internal Revenue Service after tax audits resulted in an agreement by the taxpayers and the government concerning deficiencies for previous tax years. Although the taxpayers forwarded to the IRS the sums for the agreed deficiencies, the IRS failed to "assess" the deficiencies within the statutory period for assessment.[1] See 26 U.S.C. §6501. The district court granted summary judgment in favor of the taxpayers. The government appeals.

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[1] *This failure apparently was due to intra-office procedural deficiencies introduced when the IRS converted to a new computerized accounting system.*

The taxpayers, arguing in support of the judgment in their favor, contend that their agreement to the amounts of their deficiencies was contingent upon formal assessment of the deficiencies; that since the assessments were not made within the time allowed by §6501, they have no tax liabilities for the deficiencies; and that they therefore are entitled to the return of the sums they forwarded to the IRS in fulfillment of their agreement. We disagree, and reverse the district court's judgment with regard to the amounts that were paid prior to the running of the assessment period.

I.

Taxpayers filed joint federal income tax returns for the years 1976 through 1979 and paid the taxes that were

reflected on their returns. Later the IRS audited the returns and proposed adjustments resulting in deficiencies. After negotiation, the government and the taxpayers executed Closing Agreements (Forms 906) for these years purporting to settle their dispute as to the adjustments and deficiencies.[2]

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[2] *The agreements executed by the parties are each characterized as "Closing Agreement On Final Determination Covering Specific Matters." Each agreement contains language similar to the following:*

> *WHEREAS, a dispute has arisen between the parties as to the amount of the taxpayer(s)' distributive share of income, gain, loss, deduction or credit from [name of company];*
>
> *WHEREAS, the parties wish to determine with finality the taxpayer(s)' distributive share of income, gain, loss, deductions, or credit for the year(s) 1976 from the [company] . . . .*

See 26 U.S.C. § 7121 (authorization for and finality of closing agreements).

Additionally, the taxpayers executed Forms 1902-B and 4549--"Reports of Income Tax Examination Changes." The agreements were executed by taxpayers on July 31, 1984. Some two weeks later, in mid-August, the agreements were approved by the Commissioner's authorized representative. The next day, the taxpayers forwarded to the IRS their check in the amount of $258,956.18. Notations on the check indicated how the sum was to be apportioned among tax years; the year-by-year amounts corresponded exactly with the deficiency amounts to which the taxpayers had agreed. Taxpayers remitted additional checks to cover interest on the deficiencies.

Some time after their remittances, taxpayers became aware that the IRS had not formally assessed the deficiencies within the time allowed by statute and their agreed extension of the statutory period.[3] After informal claims for refund were denied, taxpayers brought this action in the district court in June of 1988 for return[4] of the sums they had paid for deficiencies and interest.

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3 *Deficiencies must be assessed within three years of filing the return, 26 U.S.C. §6501(a), unless this period is extended by agreement between the taxpayer and IRS, §6501(c)(4). In this case, taxpayers had agreed to extend the time for assessment to December 31, 1984.*

4 *The complaint stated, "This is an action . for the recovery of individual income taxes and interest, erroneously or illegally assessed or collected from the Plaintiffs, and for which claims for refund were erroneously or illegally disallowed." The parties argue whether the Ewings' action was for a "refund" or a "return" and the effect if it is one or the other. However, the fact that the Ewings may have misused the word "refund" in their administrative application is of no significance. We look to the substance of the contentions they advanced both below and on appeal.*

After a hearing on cross-motions for summary judgment, the district court granted judgment in the amount of $333,641.17[5] in favor of the taxpayers, ruling essentially that the agreements admitting to the deficiencies were subject to a condition that the government comply with all the provisions of the Internal Revenue Code, including the requirement of §6501 that assessments be made within three years after filing of returns or by the end of any agreed extension period. The district court in effect concluded that the taxpayers' checks were remitted to the IRS not as payments but as deposits conditioned on a

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5 *This is the amount calculated by the district court to have been remitted by the taxpayers for deficiencies and interest for the tax years 1976 to 1979. Taxpayers concede there was an error in the calculation and that the amount should have been less. See infra, Part V.*

subsequent assessment and that-since the IRS did not timely assess the deficiencies--the taxpayers were entitled to a return of the deposits. The government on appeal contends that the remittances were payments of tax which the government is entitled to retain even if no timely assessment was made.

II

It should be apparent from the above discussion that taxpayers are not contending they initially paid the correct amount of tax when they filed their returns for tax years 1976-1979. By executing the Closing Agreements and associated forms, they acknowledged they owed taxes for those years, and they do not now contend that those Closing Agreements were invalid. Rather, they seek to gain advantage from the IRS's error of not making timely assessment.

Taxpayers point out correctly that the appellate courts' task in tax cases such as this is not that of weighing equities, but of determining technical application of the law. We agree with the well-established view that tax laws are technical and, for the most part, are to be accordingly interpreted. E.g., Lewyt Corp. v. Commissioner, 349 U.S. 237, 240 (1955); Brafman v. United States, 384 F.2d 863, 867-68 (5th Cir. 1967); Richardson v. Smith, 301 F.2d 305, 306 (3d Cir.) ("taxation is a game which must be played strictly in accordance with the rules"), cert. denied, 371 U.S. 820 (1962). But cf. United States v. Dalm, 110 S.Ct. 1361, 1368 n.6 (1990) (applying a "common sense" approach to the definition of "overpayment"). Even given technical interpretation and

application, however, we conclude that the 1984 remittances of the Ewings were payments of principal and interest on their tax deficiencies (as agreed to by them) properly collected by the IRS, and that the failure of the government to comply with the requirements of 26 U.S.C. §6501 does not entitle taxpayers to return of those monies.

Title 26 U.S.C. §6501, "Limitations on assessment and collection," provides:

> (a) General rule.--Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax

> shall be begun after the expiration of such period.
>
> * * *
>
> (c) Exceptions.--
>
> * * *
>
> (4) Extension by agreement.--Where, before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title . . . both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon.

The taxpayers contend that their remittances to the IRS were not payments of tax, but deposits, and that they are entitled to their return because the IRS did not comply with the conditions on which it was to be permitted to apply the deposit to their tax liabilities--i e.,

making formal assessments within the appropriate time period Their argument is that, prior to assessment, there can be no tax liability and thus no "payment" of tax.[6] They suggest that, once the statutory period for assessment is past, it is impossible for the government to create a tax liability, and therefore any "deposits" made in anticipation of assessment must be returned. Although taxpayers have cited to cases in which the reasoning infers support of their

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6 *In what seems to us to be a somewhat inconsistent position, however, the taxpayers concede that a payment results when a taxpayer forwards a remittance along with a tax return, even though that amount is not yet formally assessed. See Hill v. United States, 263 F.2d 885, 886 (3d Cir. 1959). Taxpayers distinguish their situation on the basis that it involves a deficiency rather than an initial return.*

position, we believe the weight of authority and the plain meaning of the statute compel a different conclusion.

III

There has been no firm resolution of the question of whether a taxpayer is entitled to return of monies remitted in accordance with their admitted tax deficiencies simply because the IRS failed to assess within the time requirements of §6501. Several cases from the 1930's support the government's position that it may retain such payments,[7] but those holdings arguably

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7 *Crompton & Knowles Loom Works v. White*, 65 F.2d 132 (1st Cir.), *cert. denied*, 290 U.S. 699 (1933); *Meversdale Fuel Co. v. United States*, 44 F.2d 437, 446 (Ct. Cl. 1930); *Anderson v. United States*, 15 F. Supp. 216, 224-25 (Ct. Cl. 1936), *cert. denied*, 300 U.S. 675 (1937); *Muir v. United States*, 3 F. Supp. 619, 621 (Ct. Cl. 1933).

were brought into question by the Supreme Court case of Rosenman v. United States, 323 U.S. 658 (1945). That case and subsequent decisions by several of our sister circuits have entertained questions necessarily implicating the issue of the necessity of assessment, but the outcomes in each of those cases hinged on distinct issues relating to "payment."[8]

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8 *These cases have two basic fact situations: (1) deciding whether assessment was needed to fix the time of payment for purposes of calculating the statute of limitations for filing for refund; and (2) determining when/whether payment was made for purposes of calculating interest. No appellate case since Rosenman deals directly with the issue of this case: whether amounts remitted to the IRS were amounts "erroneously or illegally collected" because of failure of the IRS to make timely assessment. But see Becker Bros. Inc. v. United States, 61 A.F.T.R.2d (P-H) 881147, 88-1150 to -1151, 88 U.S. Tax Cas. (CCH) 9262 (C.D. Ill. 1988).*

Rosenman, on which taxpayers rely heavily, decided whether estate taxes had been "paid" when remitted by the taxpayer or when later assessed by the IRS. After receiving an extension of time for filing the estate tax return, the Rosenman estate delivered a check to the IRS, noting "This payment is made under protest and duress, and solely for the purpose of avoiding penalties and interest, since it is contended by the executors that not all of this sum is legally or lawfully due." Id. at 660. The check was delivered on December 24, 1934. The IRS placed the delivered funds in a suspense account to the credit of the estate. Later, the estate filed its return. The IRS audited the return and assessed a deficiency, and the estate paid additional taxes.

In 1940, six years after the original check had been remitted, the estate filed a claim for refund, which was rejected. The estate then filed suit in the Court of Claims, which held that recovery was barred by the three-year statute of limitations[9] running from the date the taxpayer's remittance was forwarded. The Supreme Court, reversing, held that the statute of limitations commenced running only when the Commissioner assessed the delinquency after the audit. Id. at 661. In support of that conclusion, the Court stated:

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9 *The statute involved in Rosenman was 26 U.S.C. §910 (1939) (now 26 U.S.C. §6511(a)) which limits the time in which a taxpayer may file a claim for refund. The limitations statute involved here, 26 U.S.C. §6501, limits the time in which the government may assess a deficiency.*

> [O]n December 24, 1934, the taxpayer did not discharge what he deemed a liability nor pay one that was asserted. There was merely an interim arrangement to cover whatever contingencies the future might define.

Id. at 662.

The circuit courts have divided in their application of Rosenman. The Fifth Circuit has created a per se rule that there simply can be no payment of taxes prior to assessment. Thomas v. Mercantile Nat. Bank, 204 F.2d 943 (5th Cir. 1953); see also Ford v. United States, 618 F.2d 357, 361 (5th Cir. 1980) (following Thomas as precedential, but opining that Thomas should be overruled). The Eighth Circuit also took this approach in United States v. Dubuque

Packing Co., 233 F.2d 453 (8th Cir. 1956), holding that until assessment there is no tax liability defined and thus there can be no payment of tax. See also Plankinton v. United States, 267 F.2d 278, 280 (7th Cir. 1959) (generally remittances prior to the time liability is defined are not payments).

In Rosenman, however, the fact that the IRS had not assessed the estate taxes prior to the estate's initial transmittal was only one factor discussed by Justice Frankfurter. More dramatic was the estate's notation of paying under protest and duress with the intention of contesting the tax amount. The reasoning of Rosenman hardly supports the Thomas/Dubuque conclusion that there never can be tax liability without a previous tax assessment. To the

contrary, it gives weight to the notion that assessment is but one factor in consideration of whether and when a remittance becomes a payment of a valid tax liability.

A number of courts have disagreed with Thomas and Dubuque, concluding that Rosenman does not foreclose the possibility that a remittance made prior to assessment can be a payment of tax. Ameel v. United States, 426 F.2d 1270 (6th Cir. 1970); Fortugno v. Commissioner, 353 F.2d 429 (3d Cir. 1965), cert. dismissed, 385 U.S. 954 (1966); Charles Leich & Co. v. United States, 329 F.2d 649 (Ct. Cl. 1964); Hill v. United States, 263 F.2d 885 (3d Cir. 1959); Rose v. United States, 256 F.2d 223 (3d Cir. 1958); Lewyt Corp. v.

Commissioner, 215 F.2d 518 (2d Cir. 1954), aff'd in part and rev'd in part on other grounds, 349 U.S. 237 (1955). The Ameel court summarized these holdings as to what constitutes "payment":

> (1) a remittance is not per se "payment" of the tax; (2) a remittance that does not satisfy an asserted tax liability should not be treated as the "payment" of a tax; and (3) an essential factor in "payment" before assessment is the satisfaction or discharge of what the taxpayer deems a liability.

426 F.2d at 1273 (quoting 10 J. Mertens, Law of Federal Income Taxation §58.27 at 79 (1964)).

These cases (and the dicta in Ford) reason that, for purposes of deciding whether a remittance was a payment of tax, formal assessment is only one factor to be considered. Other factors deemed

relevant have included when the tax liability is defined, the taxpayer's intent in remitting the money, and how the IRS treats the remittance upon receipt.[10] In our view, the rule that tax liability is not premised on a per se requirement of previous assessment is the better reasoned one and represents the clear weight of authority.

IV

We are also of the view that §6501(a) plainly and fully describes the consequence of the IRS's failure to comply with its terms. To reiterate, it states: "the amount of any tax . . .

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10 *In this case, the IRS treated the Ewings' principal remittance as an "advance payment." While this factor, perhaps, argues in the Ewings' favor, we do not find it dispositive because we think it more significant that the Ewings voluntarily made the remittance in accordance with their agreed tax deficiencies.*

shall be assessed within three years after the return was filed . . . and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period." This section simply mandates that the United States has no authority to collect a tax forcibly after the applicable period for assessment has expired. It does not forbid the government from collecting and retaining taxes voluntarily paid without assessment and which do not constitute an overpayment.

We are persuaded by the views expressed in Hill,[11] Ford, Fortugno,

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11 *In Hill, the Third Circuit said:*

> *In our view the problem involved is a simple one. We said in Busser v. United States, 130 F.2d 537, 539 (3d Cir. 1942), that the common use of the term "payment" in both laymen's language and lawyers' language explains it as "something given to discharge a debt or obligation." Mr. Justice Frankfurter pointed out in Rosenman v. United States, (1945) 323 U.S. 658, 661, 65*

(Footnote continued on next page.)

Lewyt, and Ameel (which are supported by our reading of Rosenman), and by the language of 26 U.S.C. §6501(a) that a payment results from the remittance by a taxpayer concomitant with the recognition of a tax obligation whether by filing with a return, resolution of a dispute by an agreement, as in this case, or otherwise. The documents executed by the IRS and the Ewings were unadorned agreements recognizing and settling a tax

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(Footnote continued from previous page.)

S.Ct. 536, 537, 89 L.Ed. 535, that the three year requirement was "couched in ordinary English" and that "Congress has evidently meant what these words ordinarily convey." If a man in a haberdashery shop sees a tie marked $3.00 on the counter, picks it up and hands it to a clerk with three $1.00 bills we think there is no doubt in his mind or the clerk's mind that the money is being tendered as payment for the tie. To us this case is just as clear. A taxpayer makes out his return form; he accompanies it with a check for the amount he figures he owes. If that is not the sending of money in discharge of the debt it is hard to figure out what a "payment" can be.

It is true that the Government does not provide for the taxpayer any such simple method of ascertaining

(Footnote continued on next page.)

dispute. We see no indication of nor for that matter purpose in, the Ewings conditioning their agreement on a timely assessment. We thus find that the Ewings' remittances made in accordance with their Closing Agreements and related documents and received by the government prior to the closing of the assessment period were payments of tax which the government is entitled to retain.

V.

We do agree with the Ewings that a different analysis applies with respect to the amounts they paid in 1985.[12]

(Footnote continued from previous page.)

> *how much he owes as is indicated by the price tag on the tie. Nevertheless, the statutes and regulations do provide a set of rules in both federal estate tax and income tax and millions of taxpayers make their returns and write out their checks either as the rules direct or as the taxpayers think the rules direct.*

263 F.2d at 886. Note that, in the case sub judice, the taxpayers did have a "price tag"--the amounts to which they had agreed.

12 *Because the district court ruled that timely assessment was a condition to the*
(Footnote continued on next page.)

While the bulk of the remittances for the 1976-1979 deficiencies were made prior to the expiration of the §6501 period for assessment (December 31, 1984), taxpayers also remitted $71,158.24 in 1985 to cover interest on the deficiencies. Section 6401(a) of Title 26 states:

> The term "overpayment" includes that part of the amount of the payment of any internal revenue tax which is assessed or collected after the expiration of the period of limitation properly applicable thereto.

Since the amounts paid in 1985 were "collected" by the IRS outside of the period for assessment, with no assessment having been made, they come within this definition of "overpayment." See Diamond Garner Corp. v. Commissioner, 38 T.C. 875, 879-81 (1962) (payment of a barred tax liability, whether voluntary or

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(Footnote continued from previous page.)
government retaining any of the monies, it did not consider the difference between 1984 and 1985 payments.

involuntary, is overpayment subject to mandatory refund); cf. Guerard v. United States, 212 Ct. Cl. 591 (1977) (agreeing that tax collected after expiration of §6501 period is an overpayment under §6401); Estate of Goetz v. United States, 286 F. Supp. 128, 131 (W.D. Mo. 1968) (government conceded that interest payment which was not in hands of IRS prior to running of statute nor prior to assessment was subject to refund).[13]

The government essentially admits that the 1985 payments come within the

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13 *At first glance, it might seem that §6401(a) would also apply to the amounts remitted in 1984, but, in accordance with the reasoning of the previous sections of this opinion, a payment of properly owed taxes within the statutory period for assessment is not an overpayment even if there is no formal assessment. See also Crompton & Knowles Loom Works v. White, 65 F.2d 132 (1st Cir.), cert. denied, 290 U.S. 699 (1933). Indeed, the Ewings specifically disavow any argument that §6401(a) should apply to their 1984 remittances.*

§6401 definition of overpayment. It argues, however, that it should be allowed to retain these amounts because of the language of 26 U.S.C. §7121, which makes closing agreements binding on both parties. We do not agree that §7121 precludes the provisions of §6401 from taking effect. The closing agreements executed by taxpayers simply agreed to the amount of income, gains, losses, deductions, and credits attributable to various businesses in which taxpayers were partners. See infra note 2. They did not agree that they would abstain from claiming any refund that might be available to them under §6401. Cf. Smith v. United States, 850 F.2d 242, 245 (5th Cir. 1988) (closing agreement which determined losses from a venture did not

bar IRS from calculating tax and assessing penalties and interest as provided by law).[14]

Pursuant to 26 U.S.C. §6402(a), $28,941.29 of the 1985 payments were applied to tax liabilities for years other than those at issue here. Taxpayers concede that they are not entitled to return of that amount. The balance should be refunded in accordance with 26 U.S.C. §§6401 & 6402.

VI

In view of the above, the judgment of the district court is reversed and

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14 *See also Treas. Reg. §301.7121-1(d)(2) (1962): "Any tax or deficiency in tax determined pursuant to a closing agreement shall be assessed and collected, and any overpayment determined pursuant thereto shall be credited or refunded, in accordance with the applicable provisions of law."*

remanded for appropriate actions consistent with the views expressed in this opinion.

REVERSED AND REMANDED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION
Civil No. ST-C-88-71

ARTHUR C. EWING, a/k/a A. CLIFFORD EWING and MAXINE H. EWING,	)
Plaintiffs,	)
v.	)
THE UNITED STATES OF AMERICA,	)
Defendant.	)

J U D G M E N T

For the reasons stated in the Memorandum of Opinion filed contemporaneously herewith,

IT IS ORDERED, ADJUDGED AND DECREED that the Plaintiffs' Motion for Summary Judgment is ALLOWED and they have and recover of the Defendant, The United

States of America, the sum of THREE HUNDRED THIRTY-THREE THOUSAND, SIX HUNDRED FORTY-ONE DOLLARS AND SEVENTEEN CENTS ($333,641.17).

IT IS FURTHER ORDERED that the Defendant's Motion for Summary Judgment is DENIED; and

IT IS FURTHER ORDERED that Plaintiffs' Motion in Limine and to Compel is MOOT and is hereby DISMISSED.

THIS the 19th day of April, 1989.

Richard L. Voorhees
United States District Court
Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION
Civil No. ST-C-88-71

ARTHUR C. EWING, a/k/a A. CLIFFORD EWING and MAXINE H. EWING,	)
Plaintiffs,	)
v.	)
THE UNITED STATES OF AMERICA,	)
Defendant.	)

MEMORANDUM OF DECISION

THIS MATTER comes before the Court with several motions pending, including cross-motions for summary judgment. As plaintiffs' motion for summary judgment is to be granted, their motions in limine and to compel will be rendered moot and need not be examined. Defendant's motion for summary judgment will be denied.

This is a tax matter. Plaintiffs, Arthur C. Ewing and Maxine H. Ewing, seek to recover money they remitted to the Internal Revenue Service (IRS) in connection with their tax liabilities for the years 1976-79, inclusive. Various remittances were made in connection with an audit examination the IRS made of the Ewings' returns for the years in question. Plaintiffs eventually remitted a total of $333,641.17. Although Plaintiffs make several other arguments, the key issue is whether the monies remitted constitute "deposits" which are subject to refund under appropriate conditions, rather than payments collected for taxes due and owing. This issue is decided in Plaintiffs' favor and is dispositive of the case, so Plaintiffs need not prove any of their other contentions, and this decision need not address them.

I. APPLICABLE LAW

The starting point for answering the questions posed by this case is Rosenman et al. v. United States, 323 U.S. 658 (1945). Rosenman dealt with Plaintiffs, executors of an estate, who had remitted money to the IRS in connection with an estate tax dispute. They later filed for a refund. The question, as here, was whether the remittance constituted "payment" of a "tax." If so, Plaintiffs would have lost, being outside the three-year limit for a tax refund claim. However, the Court ruled that the remittance was merely a "deposit," placed in a special suspense account created only "for depositing money received when no assessment is then outstanding against the taxpayer." Id. at 662. Since the actual assessment of tax due had been

made by the IRS less than three years before the taxpayer filed the claim, Plaintiffs were within the statute of limitations.

The lower courts, however, are far from being in agreement that Rosenman establishes a per se rule that any monies remitted before assessment is made are always deposits and can never be payments of taxes. Those who would deny the existence of such a per se rule can point to Rosenman's remark that "[o]n December 24, 1934 [the date of the remittance], the taxpayer did not discharge what he deemed a liability nor pay one that was asserted." Id. at 662 (emphasis added). This can be taken as creating an either/or test: the tax is paid either when remittance is made pursuant to an assessment, or when the taxpayer pays what he "deem[s] a liability," that is,

what he honestly believes he owes. Herewith, a review of cases that take that view is set forth to see why the rest on weak authority and are based on factual situations which have little to do with the present case.

In Ford v. United States, 818 F.2d 357 (5th Cir. 1980), the Fifth Circuit criticized its own precedent, Thomas v. Mercantile National Bank at Dallas, 204 F.2d 943 (5th Cir. 1953), which established the per se rule in that circuit, and is still good law there. Ford asserted that "nearly every other court considering the question of when tax was 'paid' has adopted a course in conflict with that rule." Id. at 360 (citing cases). One case Ford cited was Hill v. United States, 263 F.2d 885 (3d Cir. 1959). Hill was an open-and-shut

case of a taxpayer who filled out his return wrongly and attempted to file for a refund outside the statute of limitations. "A taxpayer makes out his return form; he accompanies it with a check for the amount he figures he owes. If that is not the sending of money in discharge of the debt it is hard to figure out what a 'payment' can be." Id. at 886. Hill obviously gave little or no thought to the distinction between a payment and a deposit, as it was so clear that the remittance in that particular case was a payment. Ford also cites Colt's Mfg. Co. v. Commissioner, 306 F.2d 929 (2d Cir. 1962). This was a case where the government was attempting to assert that "no overpayment can exist until the assessment or allocation of the amount to the payment of a tax . . . ."

Id. at 932. Plaintiff Colt's Mfg. won, but only because "the effect of the Rosenman case was nullified by the enactment of Section §770(c) of the Internal Revenue Code of 1939, 26 U.S.C. (1952 ed.) . . .," Id. at 932-33. Obviously, this has nothing to do with Rosenman as it deals with a situation in which the case law is not applicable, there being an act of Congress that controls. Similarly, Ford cites United States v. Miller, 315 F.2d 354 (10th Cir. 1963). Miller dealt with a married couple who had paid "estimated tax" for two years for which they actually owed no tax. Outside the limitations period, they applied to get it back. They lost because, said the court, the Current Tax Payment Act of 1943 specified that such a situation constitutes "payment,"

notwithstanding that no tax was ever owed. Id. at 358. Therefore, Miller also is based on statutory not case law, and does not directly interpret Rosenman. Significantly, Rosenman itself stated, "([w]e need not here consider the effect of the Current Tax Payment Act of 1943 . . .)." Rosenman, supra, 323 U.S. at 663, 65 S.Ct. at 538, suggesting that Rosenman creates general principles that can be overridden by statute, but which were not so overridden in Rosenman itself. Clearly, all three of these cases lend very weak support to the proposition Ford claims to stand for.

One case Ford cites that is a bit stronger is Fortugno v. Comm. Int. Rev., 353 F.2d 429 (3rd Cir. 1965). Fortugno makes the twin observations: "Rosenman does not foreclose treating as a tax payment a remittance made prior to an

assessment'" and, "we believe . . . the weight of authority [to be] that there must either be an assessment or an acquiescence in the proposed deficiency . . . ." Id. at 435. (Emphasis added). This "acquiescence" seems to refer to some sort of formal concession by the taxpayer that he does in fact owe the tendered amount; e.g., the tax return in Hill, supra. In the instant case, the formal acquiescence, if any, would seem to have been the Closing Agreements and IRS Forms 1902-D and 4549 that the Ewings signed; but as will be seen, they carry no weight. Thus, Fortugno appears to have no applicability to today's case.

One last case that tends to support the government is Ameel v. United States, 426 F.2d 1270 (6th Cir. 1970). First, it should be noted that the facts of Ameel

are very different from the instant case: the taxes actually were formally assessed by the IRS after the Taxpayer had signed a form agreeing to additional liability; here, they never were. This might well be the "acquiescence" Fortugno talks about. But, let us look at the language of Ameel. "however, a number of courts construed certain dicta in Rosenman to suggest that payment may be effected prior to a formal assessment . . . ." Ameel, supra, at 1273 (citation omitted) (emphasis added). This is hardly the strongest language that might be imagined in interpreting Rosenman this way.

Clearly the above cases do not impress as being the most coherent or consistent views of Rosenman. Now let us examine the cases which go the other

way. The earliest one in time is Thomas v. Mercantile Nat. Bank, supra. Thomas stands foursquare for a per se rule.

> The deficiency assessment did not come into existence until the Commissioner certified the assessment list . . . . Until the Commissioner certified the assessment list . . . there was no deficiency assessment, and no liability on the part of the taxpayer, and consequently nothing to pay. The sum deposited with the Collector . . . was merely an advance deposit to cover additional tax liability expected to arise thereafter.

Id. at 944. Nothing in Thomas even remotely suggests that it is possible to pay tax before it is assessed.

Another early case is United States v. Dubuque Packing Co., 233 F.2d 453 (8th Cir. 1956). There, the court said of the district court (the Northern District of Iowa, Graven, J.) from which the appeal was being taken:

It considered that a taxpayer may transfer money to tax collecting authorities for a number of reasons other than the satisfaction of a clearly defined tax liability and that not every transfer of money by a taxpayer to a Federal tax authority will constitute a 'payment' under the laws relating to Internal Revenue. It reasoned that in the case of a proper tax return, the return itself defines the obligation, but where a taxpayer makes a transfer of money to the collector, the transfer itself does not define the tax obligation. Some further act is necessary. Accordingly, it concluded that a money transfer to a Federal tax authority (regardless of the original reason for the transfer) should start the statute of limitations running . . . on the date that the tax obligation becomes defined. On this date the transfer becomes a 'payment' because from this day forward the taxpayer has a fair opportunity to determine whether he has a claim for a refund. The Court found its course of reasoning and its conclusion supported by the decision of the Supreme Court in Rosenman v. United States . . . the reasoning compelled conclusion that the taxpayer's obligation became defined when the Commissioner made

> assessment . . . . It is the view of the Court that the transfers of money made by the taxpayer in the instant case did not have the status of 'payment' until the tax deficiencies were formally assessed by the Commissioner.

Id. at 459-60, quoting 126 F.Supp. 807 (emphasis added.)

The reasoning of the district court, as summarized, seems quite sound. The Dubuque Packing court went on to say:

> It is contended for the government against this view that the taxpayer's remittances constituted voluntary payment of the deficiencies. It stresses particularly that the taxpayer 'agreed' to the deficiencies and that it waived the restrictions on assessment and collection of the deficiencies. But the 'agreement' relied on was not an agreement to the obligation of an indebtedness in the ordinary sense. The revenue agent proposed deficiencies and the taxpayer by its 'agreement' merely indicated its willingness that the taxing process go forward to assessment. The taxpayer's right to file claim for refund

> and bring suit was not lost by the agreement but was fully preserved to the taxpayer. . . .

Dubuque Packing, supra, at 460. This reinforces the district court's assertion in the antecedent case that "some further act is necessary" beyond the mere remittance of money, such as filling out a tax return (which the district court gave as an example, and as actually happened in Hill, supra) or signing a form admitting further liability (as in Ameel, supra).

Although the facts of Dubuque Packing are not squarely on point with those of the present case, those of a district court case in the Eighth Circuit, which followed Dubuque Packing are. Estate of M. Karl Goetz v. United States, 286 F.Supp. 128 (W.D.Mo. 1968) dealt, just as the present case does,

with a taxpayer who had remitted money in response to a notice of deficiency but whom the government did not assess until after the limitations period was over. "It is therefore, our conclusion that the statute of limitations had expired at the time the assessment was made, and that the plaintiffs are entitled to recover the amounts paid to the Internal Revenue Service prior thereto, and that [the plaintiffs'] Motion for Summary Judgment should be and is sustained." Id. at 131.

Another case that should be mentioned as supporting Plaintiffs' view here, even though it is cited in Defendant's brief and not plaintiffs', is Plankinton v. United States, 267 F.2d 278 (7th Cir. 1959). Plankinton held the opposite of the Tenth Circuit's view of estimated tax payments in Miller, supra.

In Plankinton, the Seventh Circuit noted that "generally remittances made prior to the time the taxpayer's liability is defined do not constitute 'payment' of a tax for the purpose of commencing the limitations period on refund claims," and characterized estimated tax as "payments 'on account' of the tax for the taxable year i. e. a remittance on a liability not as yet finally defined or determined." Id. at 280. Here the court is clearly thinking of payment as being "defined" by some "further act" than mere remittance, as stated in Dubuque Packing. The Seventh Circuit can thus be counted' along with the Fifth and Eighth Circuits, as standing for the stricter interpretation of Rosenman.

It should be noted that these cases are nonetheless persuasive for being old. Indeed. it often happens that those

closer in time to the enactment of a statute or the handing down of a precedent know best what it really stands for. Frequently changes in social and political beliefs cause later courts to put glosses on statutes and precedents which do not really belong there. Regarding the present issue, it is worth observing that no case located anywhere near in time to Rosenman hints at the liberalized standard for "payment" that the government urges today; it did not begin to emerge, in cases which were not squarely on point, until the 1960's, and not until 1980, in Ford, do we find it baldly stated that "an examination of taxpayer intent [that is, intent expressed other than by a written agreement] has been an important factor in determining whether a remittance is

'payment' of tax." Ford, supra at 360. But note, as analyzed supra, Ford misstates the holdings of prior cases. And note that Ford's statement of the applicable standard is merely dicta and not even precedent in the Fifth Circuit, inasmuch as Mercantile National Bank is still the law there.

A head-count of the Circuits which have weighed in, then, gives the following tally: The Fifth, Seventh and Eighth with solid precedents in favor of a strict interpretation of Rosenman. The Second, Third, Sixth, and Tenth with cases of varying degrees of strength and relevance, suggesting a looser standard. And a later panel of the Fifth urging a loose standard in dicta and unsuccessfully urging that that Circuit meet en banc to reverse its earlier holding.

III. ANALYSIS

Perhaps with so many conflicting views available, it would be wise to go back to the source and see what Rosenman actually says. It notes that "[c]laims for tax refunds must conform strictly to the requirements of Congress." Rosenman, supra at 661. It then notes that according to the then-current tax law, there was a three-year statute of limitations for taxes "alleged to have been erroneously or illegally assessed or collected." Id. This requirement is "couched in ordinary English, and, since no erroneous relevant aids to construction have been called to our attention, Congress has evidently meant what these words ordinarily convey." Id. The language of the modern statute is similar, and the same common-sense

standard should apply. Everyone agrees that taxes are "assessed" by an independent process conducted by the IRS itself. The dispute then is over when a tax is "collected," and this is to be determined by the ordinary English meaning of the word.

It may even be correct to say that Rosenman stands for the proposition that no tax can ever be collected before formally assessed, except when accompanied by a return; as will be seen shortly, there is an interpretation of the language consistent with that. Nonetheless, let us assume arguendo that it is possible to have a collection before assessment, even in a case where assessment is formally required. It cannot be the case that any remittance of money at all constitutes collection, for

the taxpayer won in Rosenman. Now we get to the language the loose interpretations are based on. "[T]he taxpayer did not discharge what he deemed a liability nor pay one that was asserted." Id. at 662. Can this be taken to mean that any time a taxpayer remits money, he is "deeming" it to be due to a "liability," unless he does it kicking and screaming ("This payment is made under protest and duress, and solely for the purpose of avoiding penalties and interest, since it is contended by the executors that not all of this sum is legally or lawfully due," Id. at 660)? It would seem that some courts urge this interpretation. See, e.g., Ford v. United States, supra; "[The] per se rule, however, contradicts a concept basic to our taxing system, the concept of voluntariness. Ideally our

taxing system is a voluntary one, dependent for compliance in large part upon a sense of civic duty. The system has been described as one of 'self-assessment'." Ford at 360.

It should be borne in mind that Rosenman was written by the great Supreme Court Justice Felix Frankfurter. If he had meant to draw a distinction between those who remit money under protest, taking care to specify they do not really believe they owe it all, and those who fail to say so out loud, he would have found the words to say so more clearly. He would not have let such an important distinction lie in the single phrase, "what he deemed a liability," without further explication. The logical explanation for why that phrase was there is that Justice Frankfurter was

acknowledging, in passing, that the taxpayer in the particular case had paid under protest, without attaching any significance to that fact for future cases. This is borne out by the fact that shortly thereafter he says, "[t]he tax obligation did not become defined until April 1938," Id. at 662 (emphasis added); that is to say, not until the assessment was made. The key here is that something, other than the mere remittance of money, must happen to define the amount of the obligation. That could be an official assessment by the IRS, or a tax return or other official document signed by the taxpayer which acknowledges the amount of the obligation. It cannot be a mere check, the amount of which is based on a rough estimate by either the taxpayer or

someone in the government as to how much the taxpayer might owe. (There is always an estimate by someone; amounts on checks are not filled in at random). If that were the case, all remittances would constitute payments, and the distinction between payments and deposits would not exist.

As the Fourth Circuit has not addressed the question presented by the instant case, this Court must do so utilizing the best authorities available, but particularly relying on Rosenman, that being the last word of the Supreme Court. The Court believes the correct standard for "defining" the amount of a tax obligation consists of: (1) a tax return or the equivalent filled out by the taxpayer when he is remitting at his own initiative; or (2) either an

assessment made by the IRS, or a written acknowledgment by the taxpayer of the amount owed, when proceedings are initiated by the government; that is, by government agents informing the taxpayer that they believe he owes additional taxes. Of course, whether the initial payment is based on the taxpayer's own calculations on his return, or the government's calculation upon assessment, it is still possible for the taxpayer to claim a refund within the statutory period if he believes the initial payment to have been wrong; to that extent, it is not final. But the point is that until one of these calculations has been made, there is no tax "payment" in the first place.

The falaciousness of the loose interpretation of Rosenman can be seen by examining how unrealistic the assumptions

underpinning it are. Ford talks about "voluntariness" and its necessity to the functioning of the system. This is quite true. The vast majority of taxpayers fill out their forms themselves, remit payment, and are never questioned by the IRS. But cases such as the present one, and even Ford itself, are different in the extreme. Typically they begin with the IRS sending the taxpayer a deficiency notice. "On April 3, 1974, the Internal Revenue Service sent the Fords a statutory notice of deficiency informing them that, according to Service calculations, they had underpaid income taxes of 1970 and 1971 . . . the Fords remitted to the IRS $8,441.24." Ford at 358. It is utterly naive to equate the "voluntariness" of such payments with those of a taxpayer who has just sent in a check with his form 1040.

It is well known among tax attorneys that to make inquiry of the IRS concerning a deficiency notice frequently results in a refusal to explain how the deficiency was calculated and can bring thinly veiled threats that failure to remit promptly will result in interest, penalties, or even criminal prosecution. It would not be something to be wondered at if many taxpayers sent in checks pursuant to deficiency notices without having the slightest idea whether they owed the amount remitted, let alone "acquiesced" in it. Under those conditions, ignorance cannot be equated with acquiescence. In view of all this, something more than the mere remittance of money must be required before a taxpayer can be said to have "voluntarily" paid, or "acquiesced" in

the amount of his obligation, or that the amount of indebtedness has been "defined;" to say that money paid under duress in regard to an arbitrarily named figure, to escape worse consequences, constitutes "collection" of an obligation fairly "defined," does violence to the plain English meanings of the words "collection" and "define." Justice Frankfurter would not have approved.

III. APPLICATION TO THE FACTS OF THIS CASE

Most of the relevant facts are undisputed. The Ewings signed consent forms extending the time in which the IRS would assess additional tax. During the extension period, the IRS tentatively calculated their additional liability. They signed Closing Agreements and Forms 1902-B and 4549, effectively conceding the amount of their additional liability,

subject to later assessment and collection by the IRS. Treasury Regulations Section 301.7121-1(d)(2) ties closing agreements in to later assessments. The limitations period passed without the IRS having assessed their liability.

Very likely the Forms 1902-B and 4549 would have served as written acquiescence in the amount of obligation, as described in the analysis supra, had the government followed through on its duty to make an official assessment. Since the government did not, they are now void. This duty was in the nature of a condition subsequent to a contract. The Ewings, as contracting parties, were entitled to the protection of having the IRS review their case more closely and make sure that the amounts listed on the

forms as being the Ewings' additional obligations were not excessive. This was a material part of the contract. Since the government did not live up to it, it cannot now seek to enforce those amounts against the Ewings. Imagine if it were otherwise: The government would never have the slightest incentive to perform the assessment and, like as not, find out that its previous estimate of the additional tax was excessive. It must also be the case that the government must perform the assessment within the applicable limitations period, or not at all. A statute of limitations which does not cut off rights limits nothing.

All the other undisputed facts bring the Ewings squarely into the camp of taxpayers who are entitled to a refund,

as per the analysis in Section II, supra. Their motion for summary judgment is granted.

One additional matter remains to be discussed. Plaintiffs asked for interest on the amount sought to be refunded, on a common-law theory of unjust enrichment. Given that they could cite no case for this proposition, and that it is likely such common-law remedies were preempted by Congress' abolition of statutory interest in such circumstances, this will be denied.

IV. CONCLUSION

It may seem harsh that the government is being deprived of every penny of the amount by which the Ewings underpaid their taxes, which almost certainly was more than zero. But the IRS itself is no stranger to the use of

what might be called "technicalities" where taxpayers fall beyond a time limit, even innocently. Its harsh three-year statute of limitations for refunds may cut off a taxpayer's rights before he becomes aware that he has overpaid. The government cited in its own brief U.S. v. Miller, 315 F.2d 354 (10th Cir. 1963), which states at page 359: "The alleviation of hardship resulting from the application of a statute of limitations is a matter of policy for Congress - not for the courts."

A Judgment reflecting the findings herein will be entered simultaneously herewith.

This the 19th day of April, 1989.

Richard L. Voorhees
United States District Court Judge

APPENDIX C

FILED
December 10, 1990

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-1756

ARTHUR C. EWING, a/k/a A. CLIFFORD EWING and MAXINE H. EWING,

Plaintiffs-Appellees,

v.

THE UNITED STATES OF AMERICA,

Defendant-Appellant.

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellees' petition for rehearing and suggestion for rehearing in

banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Sprouse with the concurrence of Judge Hall and Judge Smith.

For the Court

JOHN M. GREACEN
Clerk

Supreme Court, U.S.
FILED
APR 8 1991
OFFICE OF THE CLERK

(2)

No. 90-1402

In the Supreme Court of the United States

OCTOBER TERM, 1990

ARTHUR C. EWING, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners may recover the taxes and interest they paid pursuant to a Closing Agreement negotiated and executed by them under Section 7121 of the Internal Revenue Code when, after the payment was received, the Internal Revenue Service did not make an assessment of the taxes and interest set forth in the Closing Agreement.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1402

ARTHUR C. EWING, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A29) is reported at 914 F.2d 499. The opinion of the district court (Pet. App. B3-B34) is reported at 711 F. Supp. 265.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1990. A timely petition for rehearing, with suggestion for rehearing in banc, was denied on December 10, 1990 (Pet. App. C). The petition for a writ of certiorari was filed on February 20, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 7121 of the Internal Revenue Code of 1986, (26 U.S.C.), provides as follows:

> (a) *Authorization.* – The Secretary is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal revenue tax for any taxable period.
>
> (b) *Finality.* – If such agreement is approved by the Secretary (within such time as may be stated in such agreement, or later agreed to) such agreement shall be final and conclusive, and, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact –
>
> (1) the case shall not be reopened as to the matters agreed upon or the agreement modified by any officer, employee, or agent of the United States, and
>
> (2) in any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded.

STATEMENT

1. Petitioners filed federal income tax returns for the years 1976 through 1979 and paid the taxes indicated on their returns. The Internal Revenue Service audited those returns and proposed adjustments resulting in deficiencies. In connection with those audits, petitioners executed consents extending the time for the assessment of deficiencies to December 31, 1984, as authorized by Section 6501(c)(4) of the Internal Revenue Code.[1] Pet. App. A3-A6 & n.3.

[1] Unless otherwise indicated, statutory references are to the Internal Revenue Code (26 U.S.C.), as amended and effective during the years involved.

After negotiating with representatives of the Internal Revenue Service, petitioners executed Closing Agreements on July 31, 1984, that resolved the adjustments and deficiencies that had been proposed. Two weeks later, the Closing Agreements were approved by the Commissioner pursuant to Section 7121(a).[2] On the next day, petitioners sent to the Internal Revenue Service their check in the amount of $258,956.18, with notations on the check indicating how the sum was to be applied to the taxes for the several years covered by the Closing Agreements. These amounts corresponded exactly with the deficiency amounts to which petitioners had agreed. Petitioners thereafter remitted additional checks to cover interest on the deficiencies. Pet. App. A4-A5.

2. Having received payment of the taxes due, the Internal Revenue Service did not make assessments of the amounts remitted by petitioners. When petitioners became aware that assessments had not been entered prior to December 31, 1984, the date to which the period for assessment had been extended, petitioners filed claims for refund of the sums they had paid under the Closing Agreement. After these claims were denied, petitioners instituted this action in the district court seeking to recover their payments. Pet. App A6.

Upon cross-motions for summary judgment, the district court entered judgment for petitioners in the amount of $333,641.17, the total amount of the deficiencies and interest paid pursuant to the Closing Agreements. Pet. App.

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[2] With respect to Closing Agreements, Section 7121 speaks in terms of agreements entered into by "the Secretary." But Section 7701(a)(11) provides that "[t]he term 'Secretary' means the Secretary of the Treasury or his delegate." Section 7701(a)(12) defines the phrase "or his delegate" to include officers or employees authorized "directly, or indirectly by one or more redelegations of authority, to perform the function mentioned."

B1-B2. Purporting to rely upon this Court's decision in *Rosenman* v. *United States*, 323 U.S. 658 (1945), the district court concluded that a tax could not be said to have been "paid" prior to assessment; until assessment, any remittance by the taxpayer was merely a deposit (Pet. App. B3-B30). The district court assumed that petitioners were therefore entitled to recover the amounts they had remitted under Section 6401 of the Code, which authorizes the recovery of payments of taxes that are either "assessed or collected" after expiration of the period for assessment. 26 U.S.C. 6401(a). While the court acknowledged that, under the terms of the Closing Agreements, petitioners had "effectively conced[ed] the amount of their additional liability," the court reasoned that their liability was conditioned upon "later assessment and collection by the IRS" (Pet. App. B30-31). Despite the fact that the terms of the Closing Agreements had been negotiated and accepted by petitioners, and had been approved after review by the Commissioner, the district court held that (Pet. App. B31-B32):

> The Ewings, as contracting parties, were entitled to the protection of having the IRS review their case more closely and make sure that the amounts listed on the forms as being the Ewings' additional obligations were not excessive.

3. The court of appeals reversed. Acknowledging that a minority of courts of appeals agreed with the district court's reading of *Rosenman* to the effect that a tax is not "paid" but is only "deposited" until it has been assessed (Pet. App. A13-A21),[3] the court announced that its own reading

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[3] *Thomas* v. *Mercantile Nat'l Bank*, 204 F. 2d 943 (5th Cir. 1953); *United States* v. *Dubuque Packing Co.*, 233 F.2d 453 (8th Cir. 1956). As the court pointed out, the panel that decided *Ford* v. *United States*, 618 F.2d 357 (5th Cir. 1980), felt itself bound by *Thomas*, but expressed the opinion that it should be overruled. *Id.* at 361.

of *Rosenman* was otherwise, in accordance with the majority view that "payment" has the meaning attributed to it in ordinary usage and is not to be identified with, or dependent upon, assessment (Pet. App. A21-A24, citing, *e.g.*, *Ameel* v. *United States*, 426 F.2d 1270 (6th Cir. 1970); *Hill* v. *United States*, 263 F.2d 885, 886 (3d Cir. 1959); *Lewyt Corp.* v. *Commissioner*, 215 F.2d 518 (2d Cir. 1954), aff'd in part and rev'd in part on other grounds, 349 U.S. 237 (1955)). The court of appeals further observed that it saw "no indication of nor for that matter purpose in, the Ewings conditioning their agreement [to pay their admitted tax liability] on a timely assessment." Pet. App. A24. The tax having been paid, there was no need for assessment. The court thus held that (*ibid.*):

> the Ewings' remittances made in accordance with their Closing Agreements and related documents and received by the government prior to the closing of the assessment period were payments of tax which the government is entitled to retain.[4]

ARGUMENT

We acknowledge that, outside the context of Closing Agreements made under Section 7121 of the Code, a conflict exists among the courts of appeals on whether a voluntary payment made to extinguish an admitted tax liability must be accompanied by a timely assessment of taxes under Section 6501 to avoid a taxpayer's subsequent claim for a refund under Section 6401. We further acknowledge that

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[4] The court further held that Section 7121 does not override the provisions of Section 6401(a), and that petitioners therefore are entitled to recover the amount of interest they had paid after December 31, 1984 (Pet. App. A24-A28). While we disagree with that ruling, we have not sought review of it.

the court of appeals appears to have believed that this issue was properly before it. In fact, however, the court of appeals need not have addressed or considered that issue in this case.

Instead, this case is governed by the finality provisions of Section 7121(b) of the Code, which provide that any liability "determination" or "payment" made under a Closing Agreement "shall not be annulled, modified, set aside, or disregarded" in "any suit, action or proceeding." 26 U.S.C. 7121(b)(2).[5] The courts of appeals have consistently applied these finality provisions to prevent taxpayers from escaping the liability admitted by them in Closing Agreements. Because there is no conflict on this dispositive issue, further review is not warranted.

1. Section 7121(a), which authorizes Closing Agreements, and Section 7121(b), which provides for their finality, have existed without substantial change since the enactment of Section 606 of the Revenue Act of 1928, ch. 852, 45 Stat. 791.[6] It is not disputed that the Closing Agreements in this case were duly made and duly approved pursuant to Section 7121(a). Therefore, pursuant to Section 7121(b)(2), in the absence of fraud, malfeasance or misrepresentation (none of which exists in this case), the plain command of the statute is that no court "in any suit, action, or proceeding" may "annull[ ], modif[y], set aside, or disregard[ ]" "such agreement, or any determination, assessment, col-

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[5] None of the cases relied on by petitioners to establish a conflict among the circuits concerned Closing Agreements or the finality provisions of Section 7121(b).

[6] Somewhat similar provisions were enacted as Section 1312 of the Revenue Act of 1921, ch. 136, 42 Stat. 313; Section 1006 of the Revenue Act of 1924, ch. 234, 43 Stat. 340; and Section 1106 of the Revenue Act of 1926, ch. 27, 44 Stat. 113. See G.C.M. 74, V-2 C. B. 102 (1926).

lection, payment, abatement, refund, or credit made in accordance therewith." 26 U.S.C. 7121(b)(2).

It can not be questioned that this is a "suit, action, or proceeding." It is equally clear that petitioners seek to disregard, annul and set aside the "determination"[7] of their tax liability and the "payment" they made to extinguish that liability as provided under the terms of their Closing Agreements. By its explicit terms, Section 7121(b)(2) thus denies petitioners the recovery that they seek.

The plain and direct command of this statute has been followed in a longstanding and unbroken line of decisions which hold, under a variety of circumstances, that the finality provisions of Section 7121(b)(2) deny recovery of taxes and interest paid pursuant to the provisions of Closing Agreements. *Lincoln* v. *United States*, 356 F.2d 145 (Ct. Cl. 1966); *Commissioner* v. *Security Flour Mills Co.*, 135 F.2d 165, 168-169 (10th Cir. 1943), aff'd, 321 U.S. 281 (1944); *Wolverine Petroleum Corp.* v. *Commissioner*, 75 F.2d 593 (8th Cir.), cert. denied, 295 U.S. 743 (1935); *Perry* v. *Page*, 67 F.2d 635 (1st Cir. 1933), cert. denied, 292 U.S. 632 (1934); *Hering* v. *Tait*, 65 F.2d 703 (4th Cir. 1933); *Dubinsky* v. *Becker*, 64 F.2d 601 (8th Cir. 1933); *Aetna Life Ins. Co.* v. *Eaton*, 43 F.2d 711 (2d Cir.), cert. denied, 282 U.S. 887 (1930). As the court stated in *Wolverine Petroleum* (75 F.2d at 596):

> The policy of establishing the finality and conclusiveness of closing agreements once effected, except upon a showing of fraud or malfeasance or misrepre-

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[7] The Closing Agreements contain "determinations" of tax liability within the meaning of Section 7121(b)(2). See Treas. Reg. § 1.1313(a)-2:

> A determination may take the form of a closing agreement authorized by Section 7121. Such an agreement may relate to the total tax liability of the taxpayer for a particular taxable year or years or to one or more separate items affecting such liability. A closing agreement becomes final for the purposes of this section on the date of its approval by the Commissioner.

> sentation of a material fact, has proven efficacious in encouraging compromise of troublesome tax matters. To allow the finality of such agreements to be impeached upon grounds other than those enumerated in [Section 7121(b)] would tend to dimish the salutary effects of the statute.

Because petitioners' claims fall outside the clear exceptions to finality that are expressly established under the statute, the court properly denied petitioners' claims in this case.

2. The provisions of Section 7121(b) that provide finality for Closing Agreements supplement, and are not inconsistent with, other administrative provisions of the Internal Revenue Code. Petitioners emphasize (Pet. 33) that Section 6201(a) provides that the Secretary "is authorized and required to make * * * assessments of all taxes (including interest * * *)," but they pass over the fact that the same provision continues "which have not been paid * * * at the time and in the manner provided by law." Assessment is not the only method of collecting taxes. See 4 B. Bittker, *Federal Taxation of Income, Estates and Gifts* ¶ 111.5.1, at 111-89 (1981). As this Court has more than once had occasion to point out, the government may also collect taxes by bringing suit for taxes owed. *Billings* v. *United States*, 232 U.S. 261, 286-287 (1914); *United States* v. *Chamberlin*, 219 U.S. 250 (1911). The Internal Revenue Code recognizes this fact by providing in Section 6501(a), in addition to a statute of limitations for assessments, a statute of limitations for the initiation of any "proceeding in court without assessment for the collection of such tax." 26 U.S.C. 6501(a).

As this Court pointed out in *Bull* v. *United States*, 295 U.S. 247, 259 (1935), "some machinery must be provided for applying the rule to the facts in each taxpayer's case, in order to ascertain the amount due. The chosen instrumen-

tality for the purpose is an administrative agency whose action is called an assessment." Assessment serves as the beginning point, not the conclusion of the process of collecting taxes. See *id.* at 260. An assessment must be issued before a lien may be imposed upon the taxpayer's property (Sections 6321 and 6322), and before a levy on the property of the taxpayer may issue for collection of unpaid taxes (Section 6331). But an assessment is not final. While it enjoys a presumption of correctness, its correctness is open to challenge in a suit for refund of previously assessed taxes or in a suit by the government to reduce an assessment to judgment. See 14 J. Mertens, *Law of Federal Income Taxation* § 49E.47 (1987).

Assessment serves the purpose of ascertaining the government's view of the amount it claims is due (see *Bull* v. *United States*, 295 U.S. at 259)—a purpose that is equally well served, and with greater finality, when the government institutes suit to reduce a claimed tax liability to judgment. The same purpose is also served, with the complete finality prescribed by Section 7121(b), by a Closing Agreement. The procedure for reaching a Closing Agreement is intentionally made "cumbersome and time consuming" (Rev. Rul. 60-287, 60-2 C. B. 188, 189) so that both the government and the taxpayer may thoroughly explore, evaluate, and define the agreement to be reached. It is therefore not supportable to say, as the district court did in this case (Pet. App. B31-B32), that the government has an obligation further to examine or audit the taxpayers' returns after a Closing Agreement has been duly executed and approved. Rather, as the court of appeals correctly observed, there was "no indication of nor for that matter purpose in, the Ewings conditioning their agreement [to pay their admitted tax liability] on a timely assessment" (Pet. App. A24).

It is true, as the regulations recognize (Treas. Regs. § 301.7121-1(d)(2)), that if a taxpayer, after entering into a

duly approved Closing Agreement, fails to fulfil his obligations and pay the taxes agreed upon, the Internal Revenue Service may then assess the unpaid taxes in order to make available the administrative remedies for collection. But the Closing Agreement itself has defined the taxpayer's obligations, and with finality. If those obligations are fulfilled by payment, as they were in this case, there is neither need nor occasion for assessment.

The court of appeals thus correctly ruled that the payments made by the taxpayer in 1984 under the terms of the Closing Agreement were not subject to refund. There is no conflict among the courts of appeals with respect to the circumstances presented in this case. Further review by this Court is therefore not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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